IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No	:	**09/780,273**
Applicant	:	**Froseth et al.**
Filed	:	**February 9, 2001**
Title	:	**Customized Food Selection, Ordering and Distribution System and Method**
TC/A.U.	:	**1794**
Examiner	:	**Thakur**
Docket No.	:	**5390USA**

APPLICANT'S REPLY BRIEF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

The Applicant of the above-identified U.S. patent application submits this Reply Brief in response to the Examiner's Answer dated December 10, 2008 and in support of an appeal from the final rejection of claims 128, 134, 135, 137-139 and 144-146 pending in this application.

I. RESPONSE TO ARGUMENTS

Initially, the Appellant notes that the Examiner added a new grounds of rejection. Specifically, the Examiner rejected claims 137 and 139 for the same reasons as claim 134. That is, claims 135, 137-139, 145 and 146 were rejected by the Examiner under 35 U.S.C. § 103(a) as being unpatentable over Ezzat in view of Katz, GoogleGroups (12/8/1999), Daenkindt et al.,

Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), and International Food Information Council (IFIC – 1998). However, the Appellant anticipated this rejection, and on pages 18, 20 and 21 of the Appeal Brief, addressed the rejections of claims 137 and 139. Therefore, no new arguments need be made to address the Appellant's position regarding these rejections such that the Appellant wishes to further the prosecution and proceed with the appeal.

On page 6 of the Examiner's Answer, the Examiner states that, because GoogleGroups (01/22/2000) and (01/19/2001) teach that sucralose does not caramelize like conventional sugar, then there must be no burning taste caused by caramelization of sugar in microwave popcorn. Initially, it is noted that caramelization is not the same as burning. Plenty of foods, including deserts, utilize caramelized ingredients. Regardless, the comments by consumers in these GoogleGroups references are complaints regarding the inability of sucralose (i.e., Splenda ®) to caramelize the same way sugar does during baking or candy making, and actually reaffirm that sucralose is chemically distinct from sugar and does not react the same way sugar does. As noted in the Appeal Brief, the chemical distinction between sugar and sugar substitutes has been found to be particularly significant when the cooking method utilized is microwave heating. Unlike conventional cooking, such as a baking operation which utilizes conduction principles, microwave heating involves the application of wavelength energy to excite molecular bonds to heat food. Therefore, microwave cooking is also distinct as it functions on a molecular level. Therefore, the effect of microwaves on food additives can be vastly different than the effect of a conventional cooking method on the same additives. For example, aspartame is thermally unstable under microwave conditions and is unsuitable as a sugar substitute in microwave cooking.

On page 7 of the Answer, the Examiner states that buying a popcorn package at a store is equivalent to the limitations of claim 128. The Appellant strongly disagrees. Claim 128 is specifically directed to a **consumer customized food product**. A product on a grocery store shelf which is ready for purchase is simply not a food product customized by a consumer. Buying pre-packaged popcorn in a store does not reasonably address this overall invention.

On page 10 of the Examiner's Answer, the Examiner asserts that the Appellant has not provided any clear and convincing evidence substantiating the assertion regarding unsuitability of microwave cooking with sugar substitutes. However, in all the previous Office Actions issued in this case, a prior appeal and various interviews, **the Examiner has never disputed this fact** and this is the first time the Appellant has been told that additional evidence is needed. Additionally, the Examiner states that the specification does not mention the instability or unstable characteristics of sugar substitutes. The Appellant respectfully asserts that it is not necessary for the specification of an invention to describe every disadvantage of the prior art or even every advantage of an invention over the prior art. Regardless, various sugar substitutes are unstable under microwave conditions. For example, various monosaccharides, glucose, dextrose derivatives, maltose and disaccharides have a significant tendency to burn in microwave popcorn systems. Additionally, it must be realized that sweeteners must be separately approved by the FDA for standard cooking and microwave cooking. This alone should prove the general unsuitability of microwave cooking with sugar substitutes and that one of ordinary skill in the art would not have deemed the use of sucralose in connection with microwave cooking obvious in view of the art of record, none of which teaches to apply sucralose to popcorn, or any other food product, prior to microwave cooking of the popcorn/food product.

On page 13 of the Answer, the Examiner states that it is not clear why microwave cooking cannot be considered "conventional cooking." However, one of ordinary skill in the art would recognize significant differences between microwave cooking and standard radiant or convection cooking. For example, the fact that certain containers may not be used to cook in a microwave (e.g., most metal and plastic containers) and the fact that ingredients must be separately approved for microwave use are evidence of the vast difference between microwave cooking and "conventional cooking", i.e., radiant or convection cooking.

On page 14 of the Answer, the Examiner states that the Appellants have not provided any clear and convincing evidence of instability that occurs as a result of employing sucralose in a microwave. However, the Appellant is not arguing that sucralose is unstable, but is instead

asserting that it would not have been obvious at the time of the invention for one of ordinary skill in the art to utilize sucralose in a microwave popcorn application. More specifically, the fact that a user may sprinkle sucralose onto popped popcorn does not lead one to formulate a pre-popped microwave popcorn product including sucralose. The Examiner has simply not found prior art which teaches the invention.

On page 15 of the Answer, the Examiner makes the unsubstantiated conclusion that, because sucralose does not caramelize in candy making or baking (according to GoogleGroups (01/22/2000) and (01/19/2001)) then sucralose would be thermally stable under microwave conditions. This conclusion is simply not supported by GoogleGroups. At most, GoogleGroups (01/22/2000) and (01/19/2001) teaches that the use of sucralose is undesirable for some candy making and baking. These references are not concerned with microwave cooking at all. Instead, the Examiner has made these leaps based on the present disclosure.

On page 17 of the Answer, the Examiner notes that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. However, that is not what the Appellant is doing. Instead, the Appellant is simply attempting to communicate that the teaching of GoogleGroups would not lead one of ordinary skill in the art in the direction the Examiner suggests. That is, the fact that sucralose is undesirable for use in the making of certain candies and baked products does not lead one to the conclusion that sucralose will prevent burning in microwave popcorn products.

On page 20 of the Answer, in response to the Appellant's argument that the Examiner has never disputed the fact that some sugar substitutes are unstable, the Examiner states that the "appellants have not provided any evidence of how this would also have been overcome in the appellants' invention." However, as also pointed out above, there is no requirement for the Appellants to describe every advantage over the prior art in the specification, or to argue non-obviousness over the prior art in the specification. The fact that there are complications in microwave cooking is known. The Appellants simply argue that one of ordinary skill in the art

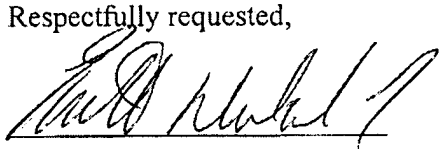
would not, even having the **twelve** references relied upon by the Examiner, have arrived at the present invention as suggested by the Examiner.

There is no doubt in the mind of the undersigned, in working on this prosecution over five years, that there exists a predisposition to the rejection of this invention. Why not, the claims are somewhat short and the Patent Office has a strong reluctance to issue claims on relatively simple inventions. However, the courts have long held that simple inventions are sometimes the most non-obvious. While it is readily apparent that considerable effort has been put forth on searching for potentially relevant prior art (even going to the extent of finding comments made in on-line chat rooms), no prior art has found teaching to even using sucralose on a product to be cooked in a microwave. Still, the Applicant has not claimed this broad concept. Instead, independent claim 128 is quite limited to a food product including unpopped popcorn, a flavoring and a microwave package, all of which must be selected by a consumer to establish a customized food product, with sucralose being in the microwave package with the unpopped popcorn and flavoring for finishing by the consumer through microwave heating. Absolutely no teaching of even making a customized, unfinished popcorn product is in the applied prior art. But that is not the broadest product claim. Instead, independent claim 135 is directed to a popcorn snack including unpopped popcorn and sucralose together in a microwave package for heating through the use of microwaves. Claim 138 has generally corresponding method limitations to this product claim. Basically, what is being presented by General Mills for a patent is microwavable popcorn with sucralose, actually a quite specific product in the overall popcorn market. The Patent Office wants to promote innovation yet, when such an innovative product/method is developed and the best prior art suggests sprinkling sucralose onto already cooked popcorn, twelve references somehow become readily available to one of ordinary skill in the art and apparently leads the ordinary skilled artisan along a path to the invention without even disclosing the base concept of just using sucralose in microwave cooking. Time after time, the Applicant thought that milestones or hurdles were being set by the Patent Examiners which, if reached, would put the Applicant on a different footing by presenting the invention in a manner distinct from the prior art, e.g., specifically limiting the claims to unpopped rather than popped popcorn, the requirement for the microwave cooking, a showing that artificial sweeteners

are not direct substitutes for sugar, a recognized distinction between conventional cooking and microwave cooking, and the generally perceived unsuitability of microwave cooking with sugar substitutes. Each of these hurdles was cleared, yet it never changed anything. More references just get tacked onto the original base rejection so we have gone from two references to twelve references. Twelve references combining to address these relatively simple and short claims, with still no teaching of providing sucralose on unpopped popcorn in a microwavable package. It is respectfully submitted that the rejections are not based on an objective look at what would be obvious based on the teachings in the references, particularly whether one of ordinary skill in the art would even consider combining the twelve reference in the manner suggested by the Examiner and then to make the additional modifications still needed to arrive at the present invention. The Applicant just does not see this hurdle being met.

In conclusion, it is respectfully submitted that the Examiner has failed to establish a proper prima facie case of obviousness under 35 U.S.C. § 103 in rejecting the claims of this application. For the reasons set forth above, the Applicant requests that the Examiner's rejections be reversed.

Respectfully requested,



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